Judgment in accordance with the opinion of the court in 91-1334, Fostvedt v. USA (Lower docket: 91-C-488) was entered on November 3, 1992.

APPENDIX A-1

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 91-1334

ROBERT J. FOSTVEDT

Petitioner,

vs.

UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE OF THE UNITED STATES; NICHOLAS F. BRADY, Secretary of the Treasury; FRED GOLDBERG, JR., Commissioner of the Internal Revenue Service; G.F. SWANSON, IRS District Director; BETTY L. MOSES, IRS Special Agent; DAVID ROMERO, IRS Agent; KIM SAVAGE, IRS Agent; SUSIE SUTTER, IRS Group Manager; BETSY SALAS, IRS Agent; CLAY CARPENTER, IRS Special Agent; and other respondents not known,

Respondents-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 91-C-488)

Submitted on the briefs:

Robert J. Fostvedt, pro se.

James A. Bruton, Acting Assistant Attorney General, Gary R. Allen, Ann B. Durney, and Mary Frances Clark, Tax Division, Department of Justice, Washington, D.C. (Michael J. Norton, United States Attorney, Denver, Colorado, of Counsel) for Respondents-Appellees.

Before McKAY, Chief Judge, and BARRETT, Circuit Judge, and BRIMMER, ** District Judge.

**Honorable Clarence A. Brimmer, District Judge, United States District Court for the District of Wyoming, sitting by designation.

McKAY, Chief Judge.

Petitioner Robert J. Fostvedt commenced this suit seeking judicial review of certain actions and decisions of the Internal Revenue Service and its agents with respect to the agency's pre-assessment procedures for his unpaid income taxes for the years 1982, 1984, and 1985. Petitioner alleges that Respondents violated his constitutional rights by (1) failing to timely respond to his request for technical advice, (2) denying him an appeals conference, (3) failing to publish its field organization and final delegations of authority in the Federal Register and (4) keeping records classifying him an "illegal tax protester" in violation of the Privacy Act.

In his petition for review, Petitioner seeks to have the Court compel the IRS to submit his request for technical advice, abate the notice of deficiency, and hold an appeal conference. In addition, he asks that the court declare the actions of the agency to be arbitrary, capricious, an abuse of discretion and unconstitutional, and enjoin the agency from further action against Petitioner until it has complied with his requests.

Respondents moved for dismissal pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, or in the

alternative, pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The district court granted Respondents' motion and dismissed Petitioner's action for lack of subject matter jurisdiction. We review the question of a district court's subject matter jurisdiction de novo, *Redmon ex rel. Redmon v. United States*, 934 F.2d 1151, 1155 (10th Cir. 1991), and we affirm.[1]

I. Jurisdiction

The United States may not be sued without its consent. *United States v. Dalm*, 494 U.S. 596, 608 (1990). Such a waiver of sovereign immunity must be strictly construed in favor of the sovereign and may not be extended beyond the explicit language of the statute. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983). "It long has been established, . . . that the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. Sehrwood*, 312 U.S. 584, 586 (1941)). A waiver of sovereign immunity cannot be implied, but must be explicitly expressed. *United States v. King*, 395 U.S. 1, 4 (1969).

Petitioner asserts that the court has subject matter jurisdiction pursuant to 18 U.S.C. §§ 1331 (federal question jurisdiction), 1340 (jurisdiction over actions arising under the Internal Revenue Code), and 1361 (jurisdiction of actions in the nature of mandamus). *Lonsdale v. United States*, 919 F.2d 1440, 1444 (10th Cir. 1990). These are statutes conferring general jurisdictional and "[s]overeign immunity is not waived by general jurisdictional statutes." *Id.* [2]

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[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

[2] Subject matter jurisdiction over internal revenue actions is provided by 28 U.S.C. § 1340. However, this grant does not constitute a waiver of sovereign immunity. *Guthrie v. Sawyer*, 970 F2d 733, 735 (10th Cir. 1992).

The burden is on the taxpayer to find and prove an "explicit waiver of sovereign immunity." *Lonsdale*, 919 F.2d at 1444. Petitioner contends that the right of judicial review provision of the Administrative Procedure Act, 5 U.S.C. § 702, when coupled with a grant of general jurisdiction, creates a waiver of sovereign immunity in this case. We do not agree. First, the APA does not create an independent grant of jurisdiction for the review of agency actions. *Eagle-Picher Indus., Inc. v. United States*, 901 F.2d 1530, 1532 (10th Cir. 1990). Second, § 702 clearly disclaims any effect on existing limitations on the court's power to grant relief.

Section 702 reads in pertinent part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therin be denied on the ground that it is against the United States or that the United States an indispensable party. . . . Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Although disguised as a procedural challenge, the essence of Petitioner's action is an attempt to delay and/or prevent the IRS from assessing and collecting the income tax deficiencies and penalties due because of Petitioner's failure to file income tax returns for the years in question. *James v. United States*, 970 F.2d 750, 753-54 (10th Cir. 1992).[3]

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[3] We note that in Petitioner's complaint, he claims to have

Actions in the nature of Petitioner's suit are prohibited by the Anti-Injunction Act. 26 U.S.C. § 7421(a), and the tax exception provision of the Declaratory Judgment Act, 28 U.S.C. § 2201. Section 7421(a) provides that no suit to restrain the assessment or collection of any tax shall be maintained. In addition, the Declaratory Judgment Act specifically prohibits declaratory judgments in matters relating to federal taxes. *See* 28 U.S.C. § 2201; *Flora v. United States*, 362 U.S. 145, 164 (1960).[4]

Contrary to petitioner's assertions, § 702 of the APA does not override the limitations of the Anti-Injunction Act and the Declaratory Judgment Act. *See McCarty v. United States*, 929 F.2d 1085, 1088 (5th Cir. 1991). It is clear that the Anti-Injunction Act and the Declaratory Judgment Act are part of a specific statutory framework intended by Congress as limitations not negated by the APA. *See Lonsdale*, 919 F.2d at 1444 (§ 702 does not provide authority to grant relief where other statutes forbid the relief sought). The legislative history of the 1976 amendment to § 702 specifically states that the revision is to have no affect on the limitations and prohibitions of the Anti-Injunction and Declaratory Judgment Acts. H.R. Rep. No. 1656, 94th Cong., 2d Sess. 12, *reprinted in* 1976 U.S.C.C.A.N. 6121, 6132-33. Therefore, because we agree that Petitioner has

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Footnote 3 continued.
no ties whatsoever, with the United States. R. Vol. I, doc. 20 at 2-3. He claims that he is a "Citizen of the State of Texas," and that the hospital he was born in is located on land which was never deeded to the United States. *Id.* at 2.

[4] There are statutory and judicial exception to the prohibition of both statutes. *See, e.g.*, 26 U.S.C. § § 6212(c)(1) and 6213(a); 26 U.S.C. § 7428; *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962). However, Petitioner has failed to bring himself within any of the exceptions, and thus, none are applicable here. The district court must dismiss, for lack of subject matter jurisdiction, any suit that does not fall within one of the exceptions. *Alexander v. "Americans United." Inc.*, 416 U.S. 752, 757-58 (1974).

failed to find and prove an explicit waiver of sovereign immunity in this case, we conclude that the district court was correct in dismissing Petitioner's action for lack of subject matter jurisdiction. [5]

II. Sanctions

Respondents have requested sanctions be imposed on Petitioner for a frivolous appeal pursuant to 28 U.S.C. § 1912 and Fed. R. App. P. 38. *See Casper v. Commissioner*, 805 F.2d 902, 906 (10th Cir. 1986). Petitioner has had an opportunity to respond in his reply brief. *See Braley v. Campbell*, 832 F.2d 1504, 1510 (10th Cir. 1987). Although Petitioner has a history of appeals in this court in which he has raised tax collection issues, we decline to impose sanctions in this case. However, in the event Petitioner should attempt to raise these same issues again sanctions may be considered proper.

The Judgment of the United States District Court for the District of Colorado is AFFIRMED.

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[5] Because we agree that the district court lacked subject matter jurisdiction, we do not reach the merits of Petitioner's additional claims.

APPENDIX B-1

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

CASE No. 91-C-488

ROBERT J. FOSTVEDT,
Plaintiff,
vs.

UNITED STATES OF AMERICA, et al.,
Defendants.

ORDER

CARRIGAN, J.

Petitioner, Robert J. Fostvedt, commenced this action alleging that the Internal Revenue Service (IRS) violated his constitutional rights by denying him an appeals conference, denying his request for technical assistance, and failing to publish its field organization and final delegations of authority in the Federal Register. Respondents are the IRS and nine federal employees, each named in his or her official capacity. On June 25, 1991, the respondents moved to dismiss. Petitioner initially was ordered to respond to the motions no later than July 10, 1991, but he requested and was granted an extension until July 29, 1991. Rather than responding, the petitioner apparently tried to overcome the defects highlighted by the respondents' motions by filing an amended petition.

Respondents assert that his court lacks subject matter jurisdiction. A suit against a federal agency is deemed to be a suit against the United States "if judgment would expend itself on the public treasury or domain . . . ." *Dugan et al. v. Rank et al.*, 372 U.S. 609, 620. In addition, an action against a government official in his or her official capacity is a suit against the United States. *Id.* at 620. Therefore, this action must be

construed as a suit against the United States.

As sovereign, the United States is immune from suit unless it expressly has consented to be sued. The terms of its consent to be sued define the court's jurisdiction to entertain the action. *United States v. Testan*, 424 U.S. 392, 399 (1976); *Ascot Dinner Theatre Ltd. v. Small Business Administration*, 887 F.2d 1024, 1027 (10th Cir. 1989). It follows that the petitioner is barred except to the extent that the United States may have waived sovereign immunity.

Waiver of sovereign immunity can not be implied, but must be unequivocally expressed. *Testan*, 424 U.S. at 399; *Ascot*, 887 F.2d at 1027. In his amended petition, the petitioner asserts that the United States has waived sovereign immunity pursuant to 5 U.S.C. §§ 551(13), 552a(e), 701, 702, 703, 704, 705 and 706 (the Administrative Procedure Act) and 26 U.S.C. § 7805. Absent a clear waiver of sovereign immunity in one of the statutes relied on to support jurisdiction, the petition must be denied.

In *Lonsdale v. United States*, 919 F.2d 1440, 1444 (10th Cir. 1990), the Tenth Circuit stated that "[t]he Administrative procedure Act itself is not a grant of jurisdiction for the review of agency actions." Thus, none of the act's provisions relied upon by the petitioner waives sovereign immunity. *Id.*

Section 7805 of Title 26 does not deal with either federal court jurisdiction or sovereign immunity. It is difficult to understand how the petitioner could argue that that section could be construed as an explicit waiver of sovereign immunity. I conclude that it is not such a waiver.

Because the United States has not waived its sovereign immunity, the Petition must be dismissed.

Accordingly IT IS ORDERED that the respondents' motions to dismiss are granted and the petition is dismissed for each of lack of subject matter jurisdiction.

Dated at Denver, Colorado July 30, 1991.

BY THE COURT:

/S/

JIM R. CARRIGAN

UNITED STATES DISTRICT JUDGE

APPENDIX C-1

26 CODE OF FEDERAL REGULATIONS § 601.105(b)(5)

(5) *Technical advice from the National Office - (i) Definition and nature of technical advice. (a)* As used in this subparagraph, "technical advice" means advice or guidance as to the interpretation and proper application of internal revenue laws, related statutes, and regulations, to a specific set of facts, furnished by the National Office upon request of a district office in connection with the examination of a taxpayer's return or consideration of a taxpayer's return claim for refund or credit. It is furnished as a means of assisting Service personnel in closing cases and establishing and maintaining consistent holdings in the several districts. It does not include memorandums on matters of general technical application furnished to district offices where the issues are not raised in connection with the examination of a return of a specific taxpayer.

(b) The consideration or examination of the facts relating to a request for a determination letter is considered to be in connection with the examination or consideration of a return of the taxpayer. Thus, a district director may, in his discretion, request technical advice with respect to the consideration of a request for a determination letter.

(c) If a district director is of the opinion that a ruling letter previously issued to a taxpayer should be modified or revoked, and requests the National Office to reconsider the ruling, the reference of the matter to the National Office is treated as a request for technical advice and the procedures specified in subdivision *(iii)* of this subparagraph should be followed in order that the National Office may consider the district director's recommendation. Only the National Office can revoke a ruling letter. Before referral to the National Office, the district director should inform the taxpayer of his opinion that the ruling letter should be revoked. The district director, after development of the facts and consideration of the taxpayer's arguments, will decide whether to recommend revocation of the ruling to the National Office. For procedures related to a request for a ruling, see § 601.201.

(d) The Assistant Commissioner (Technical), acting under a delegation of authority from the Commissioner of Internal

Revenue, is exclusively responsible for providing technical advice in any issue involving the establishment of basic principles and rules for the uniform interpretation and application of tax laws other than those which are under the jurisdiction of the Bureau of Alcohol, Tobacco and Firearms. This authority has been largely redelegated to subordinate officials.

(e) The provisions of this subparagraph apply only to a case under the jurisdiction of a district director but do not apply to an Employee Plans case under the jurisdiction of a key district director as provided in § 601.201(o) or to an Exempt Organization case under the jurisdiction of a key district director as provided in § 601.201(n). The technical advice provisions applicable to Employee Plans and Exempt Organization cases are set forth in § 601.201(n)(9). The provisions of this subparagraph do not apply to a case under the jurisdiction of the Bureau of Alcohol, tobacco, and Fire arms. They also do not apply to a case under the jurisdiction of an Appeals office, including a case previously considered by Appeals. The technical advice provisions applicable to a case under the jurisdiction of an Appeal office, other than Employee Plans and Exempt Organizations cases, are set forth in § 601.106(f)(10). A case remains under the jurisdiction of the district director even though an Appeals office has the identical issue under consideration in the case of another taxpayer (not related within the meaning of section 267 of the Code) in an entirely different transaction. Technical advice may not be requested with respect to a taxable period if a prior Appeals disposition of the same taxable period of the same taxpayer's case based on mutual concessions (ordinarily with a Form 870-AD, Offer of Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and of Acceptance of Overassessment). However, technical advice may be requested by a district director on issues previously considered in a prior Appeals disposition, not based on mutual consessions, of the same taxable periods of the same taxpayer with the concurrance of the Appeals office that had the case.

(ii) Areas in which technical advice may be requested. *(a)* District directors may request technical advice on any technical or procedural question that develops during the audit or examination of a return, or claim for refund or credit, of a tax-

payer. These procedures are applicable as provided in subdivision *(i)* of this subparagraph.

(b) District directors are encouraged to request technical advice on any technical or procedural question arising in connection with any case of the type described in subdivision *(i)* of this subparagraph, which cannot be resolved on the basis of law, regulations or a clearly applicable revenue ruling or other precedent issued by the National Office. This request should be made at the earliest possible state of the examination process.

(iii) requesting technical advice. (a) It is the responsibility of the district office to determine whether technical advice is to be requested on any issue before that office. However, while the case is under the jurisdiction of the district director, a taxpayer or his/her representative may request that an issue be referred to the National Office for technical advice on the grounds that a lack of uniformity exists as to the disposition of the issue, or that the issue is so unusual or complex as to warrant consideration by the National Office. This request should be made at the earliest possible state of the examination process. While taxpayers are encouraged to make written requests setting forth the facts, law, and argument with respect to the issue, and reason for requesting National Office advice, a taxpayer may make the request orally. If, after considering the taxpayers request, the examiner is of the opinion that the circumstances do not warrant referral of the case to the National Office, he/she will so advise the taxpayer. (See subdivision *(iv)* of this subparagraph for taxpayer's appeal rights where the examiner declines to request technical advice.)

(b) When technical advice is to be requested, whether or not upon the request of the taxpayer, the taxpayer will be so advised, except as noted in *(g)* of this subdivision. If the examiner initiates the action, the taxpayer will be furnished a copy of the statement of the pertinent facts and the question or questions proposed for submission to the National Office. The request for advice submitted by the district director should be so worded as to avoid possible misunderstanding, in the National Office, of the facts or of the specific point or points at issue.

(c) After receipt of the statement of facts and specific

questions from the district office, the taxpayer will be given 10 calendar days in which to indicate in writing the extent, if any, to which he may not be in complete agreement. An extension of time must be justified by the taxpayer in writing and approved by the Chief, Examination Division. Every effort should be made to reach agreement as to the facts and specific point at issue. If agreement cannot be reached, the taxpayer may submit, within 10 calendar days after receipt of notice from the district office, a statement of his understanding as to the specific point or points at issue which will be forwarded to the National Office with the request for advice. An extension of time must be justified by the taxpayer in writing and approved by the Chief, Examination Division.

(d) If the taxpayer initiates the action to request advice, and his statement of the facts and point or points at issue are not wholly acceptable to the district officials, the taxpayer will be advised in writing as to the areas of disagreement. The taxpayer will be given 10 calendar days after receipt of the written notice to reply to the district official's letter. An extension of time must be justified by the taxpayer in writing and approved by the Chief, Examination Division. If agreement cannot be reached, both the statements of the taxpayer and the district official will be forwarded to the National Office.

(e)(1) In the case of requests for technical advice the taxpayer must also submit, within the 10-day period referred to in *(c)* and *(d)* of this subdivision, whichever applicable (relating to agreement by the taxpayer with the statement of facts submitted in connection with the request for technical advice), the statement described in *(f)* of this subdivision of proposed deletions pursuant to section 6110(c) of the Code. If the statement is not submitted, the taxpayer will be informed by the district director that such a statement is required. If the district director does not receive the statement within 10 days after the taxpayer has been informed of the need for such statement, the district director may decline to submit the request for technical advice. If the district director decides to request technical advice in a case where the taxpayer has not submitted that statement of proposed deletions, the National Office will make those deletions which in the judgment of the Commissioner are re-

quired by section 6110(c) of the Code.

(2) The requirements included in § *601.105(b)(5)* with respect to submissions of statements and other material with respect to proposed deletions to be made from technical advice memoranda before public inspection is permitted to take place do not apply to requests made by the district director before November 1, 1976, or request for any document to which section 6104 of the Code applies.

(f) In order to assist the Internal Revenue Service in making the deletions, required by section 6110(c) of the Code, from the text of technical advice memoranda which are open to public inspection pursuant to section 6110(a) of the Code, there must accompany requests for such technical advice either a statement of the deletions proposed by the taxpayer and the statutory basis for each proposed deletion, or a statement that no information other than names, addresses and taxpayer identifying number need be deleted. Such statements shall be made in a separate document. The statement of proposed deletions shall be accompanied by a copy of all statements which are submitted to the National Office pursuant to *(c)* or *(d)* of this subdivision, on which shall be indicated, by the use of brackets, the material which the taxpayer indicated should be deleted pursuant to section 6110(c) of the Code. The statement of proposed deletions shall indicate the statutory basis, under section 6110(c) of the Code, for each proposed deletion. The statement of proposed deletions shall not appear or be referred to anywhere in the request for technical advice. If the taxpayer decides to request additional deletions pursuant to section 6110(c) of the Code prior to the time the National Office replies to the request for technical advice, additional statements may be submitted.

(g) If the taxpayer has not already done so, the taxpayer may submit a statement explaining the taxpayer's position on the issues, citing precedents which the taxpayer believes will bear on the case. This statement will be forwarded to the National Office with the request for advice. If it is received at a later date, it will be forwarded for association with the case file.

(h) At the time the taxpayer is informed that the matter is being referred to the National Office, the taxpayer will also

be informed of the taxpayer's right to a conference in the National Office in the event an adverse decision is indicated, and will be asked to indicate whether such a conference is desired.

(i) Generally, prior to replying to the request for technical advice the National Office shall inform the taxpayer orally or in writing of the material likely to appear in the technical advice memorandum which the taxpayer proposed be deleted but which the Internal Revenue Service determined should not be deleted. If so informed the taxpayer may submit within 10 days any further information, arguments or other material in support of the position that such material be deleted. The Internal Revenue Service will attempt, if feasible, to resolve all disagreements with respect to proposed deletions prior to the time the National Office replies to the request for technical advice. However, in no event shall the taxpayer have the right to a conference with respect to resolution of any disagreements concerning material to be deleted from the text of the technical advice memorandum, but such matters may be considered at any conference otherwise scheduled with respect to the request.

(j) The provisions of *(a)* through *(i)* of this subdivision, relating to the referral of issues upon request of the taxpayer, advising taxpayers of the referral of issues, the submission of proposed deletions, and the granting of conferences in the National Office, are not applicable to technical advice memoranda described in section 611(g)(5)(A) of the Code, relating to cases involving criminal or civil fraud investigation and jeopardy or termination assessments. However, in such cases the taxpayer shall be allowed to provide the statement of proposed deletions to the National Office upon completion of all proceedings with respect to the investigations or assessments, but prior to the date on which the Commissioner mails the notice pursuant to section 6110(f)(1) of the Code of intention to disclose the technical advice memorandum.

(k) Form 4463, Request for Technical Advice, should be used for transmitting requests for technical advice to the National Office.

(iv) Appeal by taxpayers of determination not to seek technical advice. (a) If the taxpayer has requested referral of an issue before a district office to the National Office for tech-

nical advice, and after consideration of the request the examiner is of the opinion that the circumstances do not warrant such referral, he will so advise the taxpayer.

(b) The taxpayer may appeal the decision of the examining officer not to request technical advice by submitting to that official, within 10 calendar days after being advised of the decision, a statement of the facts, law, and arguments with respect to the issue, and the reasons why he believes the matter should be referred to the National Office for advice. An extension of time must be justified by the taxpayer in writing and approved by the Chief, Examination Division.

(c) The examining officer will submit the statement of the taxpayer through channels to the Chief, Examination Division, accompanied by a statement of his reasons why the issue should not be referred to the National Office. The Chief, Examination Division, will determine, on the basis of the statements submitted, whether technical advice will be requested. If he determines that technical advice is not warranted, he will inform the taxpayer in writing that he proposes to deny the request. In the letter to the taxpayer the Chief, Examination Division, will (except in unusual situations where such action would be prejudicial to the best interests of the Government) state specifically the reasons for the proposed denial. The taxpayer will be given 15 calendar days after receipt of the letter in which to notify the Chief, Examination Division, whether he agrees with the proposed denial. The taxpayer may not appeal the decision of the Chief, Examination Division, not to request technical advice from the National Office. However, if he does not agree with the proposed denial all data relating to the issue for which technical advice has been sought, including taxpayer's written request and statements, will be submitted to the National Office, Attention: Director, Examination Division, for review. After review in the National Office, the district office will be notified whether the proposed denial is approved or disapproved.

(d) While the matter is being reviewed in the National Office, the district office will suspend action on the issue (except where the delay would prejudice the Government's interest) until it is notified of the National Office decision. This notification will be made 30 days after receipt of the data in the

National Office. The review will be solely on the basis of the written record and no conference will be held in the National Office.

(v) Conference in the National Office. (a) If, after a study of the technical advice request, it appears that advice adverse to the taxpayer should be given and a conference has been requested, the taxpayer will be notified of the time and place of the conference. If conferences are being arranged with respect to more than one request for advice involving the same taxpayer, they will be so scheduled as to cause the least inconvenience to the taxpayer. The conference will be arranged by telephone, if possible, and must be held within 21 calendar days after contact has been made. Extensions of time will be granted only if justified in writing by the taxpayer and approved by the appropriate Technical branch chief.

(b) A taxpayer is entitled, as a matter of right to only one conference in the National Office unless one of the circumstances discussed in *(c)* of this subdivision exists. This conference will usually be held at the branch level in the appropriate division (Corporation Tax Division or Individual Tax division) in the office of the Assistant Commissioner (Technical), and will usually be attended by a person who has authority to act for the branch chief. In appropriate cases the examining officer may also attend the conference to clarify the facts in the case. If more than one subject is discussed at the conference, the discussion constitutes a conference with respect to each subject. At the request of the taxpayer or his representative, the conference may be held at an earlier state in the consideration of the case than the Service would ordinarily designate. A taxpayer has no "right" of appeal from an action of a branch to the director of a division or to any other National Office official.

(c) In the process of review of a holding proposed by a branch, it may appear that the final answer will involve a reversal of the branch proposal with a result less favorable to the taxpayer. Or it may appear that the adverse holding proposed by a branch will be approved, but on a new or different issue or on different grounds than those on which the branch decided the case. Under either of these circumstances, the taxpayer or his representative will be invited to another conference. The

provisions of this subparagraph limiting the number of conferences to which a taxpayer is entitled will not foreclose inviting a taxpayer to attend further conferences when, in the opinion of National Office personnel, such need arises. All additional conferences of this type discussed are held only at the invitation of the Service.

(d) It is the responsibility of the taxpayer to furnish to the National Office, within 21 calendar days after the conference, a written record of the conference, a written record of any additional data, line of reasoning, precedents, etc., that were proposed by the taxpayer and discussed at the conference but were not previously or adequately presented in writing. Extensions of time will be granted only if justified in writing by the taxpayer and approved by the appropriate Technical branch chief. Any additional material and a copy thereof should be addressed to and sent to the National Office which will forward the copy to the appropriate district director. The district director will be requested to give the matter his prompt attention. He may verify the additional facts and data and comment upon it to the extent he deems it appropriate.

(e) A taxpayer or a tax payer's representative desiring to obtain information as to the status of the case may do so by contacting the following offices with respect to matters in the areas of their responsibility:

Official	Telephone numbers, (Area Code 202)
Director Corporation Tax Division	566-4504 or 566-4505
Director Individual Tax Division	566-3767 or 566-3788

(vi) Preparation of technical advice memorandum by the National Office. (a) Immediately upon receipt in the National Office, the technical employee to whom the case is assigned will analyze the file to ascertain whether it meets the requirements of subdivision *(iii)* of this subparagraph. If the case is not complete with respect to any requirement in subdivisions *(iii)(a)* through *(d)* of this subparagraph, appropriate steps will be taken to complete the file. If any request for technical advice does not comply with the requirements of subdivision

(iii)(e) of this subparagraph, relating to the statement of proposed deletions, the National Office will make those deletions from the technical advice memorandum which in the judgment of the Commissioner are required by section 61210(c) of the Code.

(b) If the taxpayer has requested a conference in the National Office the procedures in subdivision *(v)* of this subparagraph will be followed.

(c) Replies to request for technical advice will be addressed to the district director and will be drafted in two parts. Each part will identify the taxpayer by name, address, identification number, and the year or years involved. The first part (hereafter called the "Technical Advice Memorandum") will contain *(1)* a recitation of the pertinent facts having a bearing on the issue; *(2)* a discussion of the facts, precedents, and reasoning of the National Office; and *(3)* the conclusions of the National Office. The conclusions will give direct answers, whenever possible, to the specific questions of the district office. The discussion of the issues will be in such detail that the district officials are appraised of the reasoning underlying the conclusion. There shall accompany the technical advice memorandum a notice pursuant to section 6110(f)(1) of the Code of intention to disclose the technical advice memorandum (including a copy of the version proposed to be open to public inspection and notations of third party communications pursuant to section 6110(d) of the Code) which the district director shall forward to the taxpayer at such time that the district director furnishes a copy of the technical advice memorandum to the taxpayer pursuant to *(e)* of the subsection.

(d) The second part of the reply will consist of a transmittal memorandum. In the unusual cases it will serve as a vehicle for providing the district office administrative information or other information which, under the nondisclosure statutes, or for other reasons, may not be discussed with the taxpayer.

(e) It is the general practice of the Service to furnish a copy of the technical advice memorandum to the taxpayer after it has been adopted by the district director. However, in the case of a technical advice memoranda described in section 6119(g)(5)(A) of the Code, relating to cases involving criminal or civil fraud investigations and jeopardy or termination assess-

ments, a copy of the technical advice memorandum shall not be furnished the taxpayer until all proceedings with respect to the investigations or assessments are completed.

(f) After receiving the notice pursuant to section 6110(f)(1) of the Code of intention to disclose the technical advice memorandum, if the taxpayer desires to protest the disclosure of certain information in the technical advice memorandum, the taxpayer must within 20 days after the notice is mailed submit a written statement identifying those deletions not made by the Internal Revenue Service which the taxpayer believes should have been made. The taxpayer shall also submit a copy of the version of the technical advice memorandum proposed to be open to public inspection on which the taxpayer indicates, by the use of brackets, the deletions proposed by the taxpayer but which have not been made by the Internal Revenue Service. Generally the Internal Revenue Service will not consider the deletion under this subparagraph of any material which the taxpayer did not, prior to the time when the National Office sent its reply to the request for technical advice to the district director, propose be deleted. The Internal Revenue Service shall, within 20 days after receipt of the response by the taxpayer to the notice pursuant to section 6110(f)(1) of the Code, mail to the taxpayer its final administrative conclusion with respect to the deletions to be made.

(vii) Action on technical advice in district offices. (a) Unless the district director feels that the conclusions reached by the National Office in a technical advice memorandum should be reconsidered and promptly requests such reconsideration, his office will proceed to process the taxpayer's case on the basis of the conclusions expressed in the technical advice memorandum.

(b) The district director will furnish the taxpayer a copy of the technical advice memorandum described in subdivision *(vi)(c)* of this subparagraph and the notice pursuant to section 6110(f)(1) of the Code of intention to disclose the technical advice memorandum (including a copy of the version proposed to be open to public inspection and notations of third party communications pursuant to section 6110(d) of the Code). The preceding sentence shall not apply to technical advice

memoranda involving civil fraud or criminal investigation, or jeopardy or termination assessments, as described in subdivision *(iii)(j)* of this subparagraph or to documents to which section 6104 of the Code applies.

(c) In those cases in which the National Office advises the district director that he should not furnish a copy of the technical memorandum to the taxpayer, the district director will so inform the taxpayer if he requests a copy.

(viii) Effect of technical advice. (a) A technical advice memorandum represents an expression of the views of the Service as to the application of law, regulations, and precedents to the facts of a specific case, and is issued primarily as a means of assisting district official in the examination and closing of the case involved.

(b) Except in rare or unusual circumstances, a holding in a technical advice memorandum that is favorable to the taxpayer is applied retroactively. Moreover, since technical advice, as described in subdivision *(i)* of this subparagraph, is issued only on closed transactions, a holding in a technical advice memorandum that is adverse to the taxpayer is also applied retroactively unless the Assistant Commissioner (Technical) exercises the discretionary authority under section 7805(b) of the Code to limit the retroactive effect of the holding. Likewise, a holding in a technical advice memorandum that modifies or revokes a holding in a prior technical advice memorandum will also be applied retroactively, with one exception. If the new holding is less favorable to the taxpayer, it will generally not be applied to the period in which the taxpayer relied on the prior holding in situations involving continuing transactions of the type described in §§ 601.201(1)(7) and 601.601(d)(2)(v).

(d) A district director may raise an issue in any taxable period, even though he or she may have asked for and been furnished technical advice with regard to the same or a similar issue in any other taxable period.

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